

*Wausau's Comments in Response to USEPA's Preliminary Decision of June 2, 1992*

## **EXHIBIT 5**

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## VIA CERTIFIED MAIL

United States Environmental Protection Agency  
Office of Waste Programs Enforcement (OS-510)  
401 M. Street, S.W.  
Washington, D.C. 20460

Attention: Mr. Fred Zimmerman

Re: In the Matter of CIW Site, Romulus, Michigan  
Employers Insurance of Wausau  
Petition for Reimbursement of Costs  
Under 42 U.S.C. Section 9606 (b) (2)

Dear Mr. Zimmerman:

On behalf of Employers Insurance of Wausau (Wausau), we respectfully submit these comments to the Region's correspondence and the Agency's correspondence to Wausau, both dated August 5, 1992. (Copies attached; the Agency's 8/5/92 correspondence is marked Exhibit "A", and the Region's correspondence is marked Exhibit "B".) The Agency's correspondence provided a copy of OSWER Directive 9833.5 concerning USEPA's "Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions". The Region's correspondence cited OSWER Directive 9833.3A-1 concerning "Final Guidance on Administrative Records for Selecting CERCLA Response Actions".

## Introduction

On June 2, 1992, the United States Environmental Protection Agency by the Agency's Headquarters ("USEPA" when referring to both Agency Headquarters in Washington, D.C. and Region V in Chicago, Illinois, and the "Agency" when referring only to Agency Headquarters in Washington, D.C., and the "Region" when referring only to Region V in Chicago, Illinois) issued a "Preliminary Decision" denying Employees Insurance of Wausau's (Wausau) Petition for Reimbursement (preliminary decision). In denying Wausau's Petition for Reimbursement, the

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Agency indicated that the Agency had considered or relied on the documents found in the administrative record created by USEPA, which administrative record included copies of the Unilateral Administrative Order (UAO), as amended, the Work Plan, also known as the ERAP, and various items of correspondence and comments from USEPA and Wausau. (See: Administrative Record, "Petition to the Administrative Record for CIW Site, Romulus, Michigan", hereinafter referred to as "AR, Petition".)

Thereafter, Wausau reviewed the AR, Petition, and requested various items of information from USEPA relating to the conclusions reached in the preliminary decision which were considered or relied on by the Agency and found in the AR, Petition. In making its preliminary decision, the Agency considered and relied extensively on the Region's correspondence to the Agency dated April 29, 1992 (copy attached; marked Exhibit "C").

Inasmuch as judicial review of some matters before the Agency concerning Petitions for Reimbursement may be limited to items found in the administrative record, Wausau submits the following comments relating to the current state of the Administrative Record, the two OSWER Directives cited above, and the various responses Wausau has received relating to its requests to supplement the Administrative Record and USEPA's actual practices and procedures relating to the use of the administrative records at the CIW Site in Romulus, Michigan.

## **Background**

Following the preliminary decision, Wausau tendered a Request for Information to the Agency dated June 18, 1992 (copy attached; marked Exhibit "D"); a Request for Information to the Region dated June 25, 1992 (copy attached; marked Exhibit "E"); a confirming letter to the Agency dated June 29, 1992 (copy attached Exhibit "F"); a confirming letter to the Agency dated July 1, 1992 (copy attached; marked Exhibit "G"); a letter dated July 10, 1992 requesting specific admissions/denials from USEPA regarding Wausau's Petition for Reimbursement (copy attached; marked Exhibit "H"). On June 25, 1992 the Region sent a letter to Wausau commenting on various aspects of this matter (copy attached; marked Exhibit "I"), and on June 31, 1992, Wausau responded to the Region's comments of June 25, 1992 (copy attached; marked Exhibit "J"). On August 1, 1992, Wausau again requested USEPA's response to the June 18 Request and the June 25 Request; and further requested additional time to review the documents (copy attached; marked Exhibit "K").

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On August 13, 1992, Wausau received the Agency's correspondence dated August 5, 1992 commenting on Wausau's June 18 and June 25 Requests for Information identified above, and Wausau's requests therein to augment the Administrative Record with various relevant documents discussed therein. The Agency indicated that certain analytical laboratory results and reports and other documents currently in the Regional Counsel's files, but not available in the Administrative Records for the Site, or any of them, were being made available to Wausau.

The Office of Regional Counsel contacted Wausau by letter dated August 17, 1992 (copy attached; marked Exhibit "L"), indicating that the documents referred to in the Agency's correspondence of August 5, 1992 were available for review and copying. Thereafter, on August 20, 1992, Wausau received a copy of various unindexed analytical laboratory reports and other documents from the Office of Regional Counsel (ORC), presumably relating to various USEPA-initiated activities at the CIW Site performed after Wausau had completed the Ordered Activities as amended by the Emergency Response Action Plan ("ERAP", a.k.a. "Work Plan") (a copy of the ORC file is attached; marked Group Exhibit "M"). The ORC file was received three weeks prior to the date that Wausau's comments are due regarding the preliminary decision, and nine weeks after Wausau's Requests for Information dated June 18 and June 25, 1992. The Agency indicated in its August 5 correspondence that the documents contained in the ORC file were not included in any administrative record relating to the CIW Site because "the Agency did not consider or rely" on the documents contained in the ORC file.

The Region also responded to Wausau's requests for documents not included or found in the Administrative Record, in its separate correspondence dated August 5, 1992, by citing the Agency's "Final Guidance on Administrative Records for Selecting CERCLA Response Actions" dated December 3, 1990, identified as "OSWER Directive 9833.34-1".

## **Comments To August 5, 1992 Agency Response**

After receiving the Preliminary Decision of June 2, 1992, Wausau noted that the Agency had considered or relied on various reports and documents apparently prepared by the Region and referred to in the Region's April 29, 1992 correspondence, but not available in any administrative record relating to the CIW Site. In an attempt to discover what information the Region had considered or relied on in preparing the April 29, 1992 correspondence, Wausau prepared its

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June 18, 1992 Requests for Information directed at seeking the specific documents and reports used by the Region and considered or relied on by the Agency in the Agency's Preliminary Decision. One week later (June 25, 1992), Wausau sought roughly the same information from the Region for the same purpose.

## Requests for Information

In general, Wausau's two requests for information directed at both the Agency and the Region can be summarized as follows:

1. Procedural Requests
  - a. Information concerning published or unpublished guidelines regulations and rules for Petitions for Reimbursements before the USEPA in non-ALJ Adjudicatory proceedings. This was generally supplied to Wausau by the Agency in the form of OSWER Directive 9833.5, but, as will be discussed herein, the practices and procedures described in the USEPA's newly-published Guidance do not adequately address issues presented by this matter. Also, the Region forwarded a copy of the Agency's Guidance on Administrative Records known as OSWER Directive 9833.3A-1 in response to Wausau's request.
  - b. Information concerning the "Statutory Threshold Requirements". The Agency responded to Wausau's request but USEPA's interpretation of the law is troublesome, as will be discussed herein.
  - c. Information seeking the specific documents considered or relied upon by the USEPA. The Agency indicated that it only considered or relied on the documents found in the administrative record relating to the Petition for Reimbursement (AR, Petition) in making the preliminary decision. The Agency however, failed to cite the documents the Region considered or relied on in preparing the Region's correspondence of April 29, 1992, which again, was considered or relied on by the Agency.
2. Agency Subject Index Requests; Wausau asked for copies of documents contained in the AR, Petition. The Agency responded by indicating that all of the documents cited in the index to the AR, Petition were available in Region V's office. Wausau copied the documents after they became available at Region V's office.

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## 3. Region Activities

- a. Wausau requested information or reports prepared by the On-Scene Coordinator, or any other person, regarding the USEPA-initiated activities. No such information or report has been delivered to Wausau to date pursuant to this request.
- b. Wausau requested information or reports prepared concerning the specific removal activities described in the Region's April 29, 1992 letter. The agency made some unverified analytical laboratory documents available to Wausau from the Regional Counsel's file (ORC's file), however, no narrative reports nor supporting documents concerning the activities were provided that would support or verify the Agency's conclusions contained in the April 29, 1992 letter. The Agency further indicated that these documents had not been included in the AR, Petition (or any administrative record relating to the CIW Site), because the Region had not "considered or relied on" them.
- e. Wausau requested information or reports concerning the Region's reported discovery that only "300 gallons of oil were present on June 24, 1991 in Tank T024". The ORC's file may have supplied some unverified and unsupported analytical documents in the form of the Regional Counsel's unindexed file, however, no narrative reports concerning the activities and reported discovery were provided that would support or verify the Region's conclusions contained in the April 29, 1992 letter.
- f. Wausau requested information or reports concerning the various disposal, removal, consolidation, decontamination activities at the Site, reportedly performed by the Region following Wausau's completed activities, and the verification that no residual PCBs were removed from the Site after Wausau's cleanup activities were completed, as described in the Region's April 29, 1992 correspondence. The ORC's file may have supplied some unverified and unsupported analytical documents in the form of the Regional Counsel's unindexed file, however, no narrative reports concerning these activities were provided that would support or verify the Region's conclusions contained in the April 29, 1992 letter.

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- g. Wausau requested information or reports concerning the "test pit" activities as described in the Region's April 29, 1992 correspondence. The ORC's file may have supplied some unverified and unsupported analytical documents in the form of the Regional Counsel's unindexed file, however, no narrative reports concerning these activities were provided that would support or verify the Region's conclusions contained in the April 29, 1992 letter.
- h. Wausau requested information or reports concerning the reported "elevated levels of PCBs at the sinks and tables in the laboratory as described in the Region's April 29, 1992 correspondence." No information was provided by the Agency or the Region concerning the alleged elevated levels of PCBs at the sinks and tables of the laboratory.

Wausau has concluded that the Region's purported conclusion concerning alleged elevated levels of PCBs at the sinks and tables in the laboratory is an ambiguous and misleading statement relating to the conditions that may have existed prior to Wausau's completion of the cleanup activities, and not really a conclusion that Wausau failed to complete the cleanup activities. In other words, the Region's reference to elevated levels does not refer to sampling events after Wausau's cleanup activities were completed, and there is no evidence that the laboratory contained elevated levels of PCBs after Wausau completed its cleanup activities. USEPA has no information, and did not supply any information to Wausau that the sinks and tables in the laboratory had elevated levels of PCBs after Wausau completed the cleanup activities. In other words, the only conclusion that is available is that Wausau completed that portion of the cleanup as Ordered.

- i. Wausau requested information or reports concerning the Region's reported decontamination of the floors and walls of the CIW block building. No information was provided by the Agency or the Region concerning the decontamination activities reportedly performed by USEPA at the CIW block building.

Wausau has concluded that the Region's reported decontamination activities at the CIW block building were unnecessary and gratuitous, and supports Wausau's conclusion that Wausau completed the cleanup as ordered. There is no information that the floors and walls of the CIW block building were contaminated after Wausau completed

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the cleanup activities at the Site or that the floors and walls required decontamination.

- j. Wausau requested information or reports concerning the reported "extensive hydrocarbon contamination", the discovery of "large oil filters and air purging cartridges", the Region's conclusion that Site structures were "contaminated" and the Region's discovery of "12 containers of used oil" at the Site as described in the Region's April 29, 1992 correspondence. No information was provided by the Agency or the Region concerning these items. Wausau has concluded that the contamination, as it was, must still exist, even after USEPA-initiated cleanup activities, and supports Wausau's conclusions that Wausau completed the cleanup, as ordered. There is no information that supports the Region's conclusion that the Site remained contaminated with TPH that amounted to an imminent and substantial endangerment to the public or the environment following Wausau's cleanup activities.
- k. Wausau requested information or reports concerning the Region's reported discovery that levels of PCBs greater than "10 mg/kg (11 (ppm) existed in the soil between aboveground tanks and ....the warehouse and the laboratory." No information was provided by the Agency or the Region concerning elevated levels of PCBs in that soil after Wausau completed the cleanup activities at the Site.

Wausau has concluded that the Region's purported conclusion concerning alleged elevated levels of PCBs in the soil between the aboveground tanks and the warehouse and laboratory is another ambiguous and misleading statement relating to the conditions as they may have existed prior to Wausau's completion of the cleanup activities, rather than a conclusion supporting the Region's position that Wausau did not complete the cleanup. In other words, the Region's reference to elevated levels does not refer to sampling events after Wausau's cleanup activities were completed, and there is no evidence that the soils contained elevated levels of PCBs following Wausau's cleanup activities.

- l. Wausau requested information or reports concerning the removal of "concrete footings from the former tank farm" structure. The ORC's file may have supplied some unverified and unsupported analytical



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reports, however no narrative reports were provided concerning the activities that would support or verify the Agency's activities in removing those footings is consistent with the Order, or with the ERAP or National Contingency Plan (NCP). Wausau has concluded that the Region's removal of the "concrete footings" was unnecessary and gratuitous, and not in furtherance of the Order or ERAP and was inconsistent with the NCP. USEPA has no information that the removal of the "concrete footings" was necessary following Wausau's completion of the cleanup activities. Furthermore, USEPA has no information that supports the Region's conclusion that the removal of concrete footings by USEPA supports the Region's conclusion that Wausau did not complete the cleanup as ordered.

- m. Wausau requested information or reports concerning the Region's activities in regrading the soil to an "acceptable slope" following the removal of the concrete footings referred to above. No information was provided by the Agency or the Region concerning the regrading activities performed by the Region. Wausau has concluded that the Region's regrading activities were unnecessary and gratuitous and not in furtherance of the Order or ERAP and was inconsistent with the NCP, and were only necessitated, if at all, by the Region's unnecessary removal of the "concrete footings" referred to above. USEPA has no information that the regrading activities were necessary following the Wausau-financed cleanup activities. Furthermore, USEPA has no information that supports the Region's conclusion that the Region's regrading activities supports the Region's conclusion that Wausau did not complete the cleanup as ordered.
- n. Wausau requested information or reports concerning the disposal of "personal protective clothing and miscellaneous debris" as F002 waste. Outside of waste manifests indicating USEPA's waste characterization, no information was provided by the Agency or the Region concerning such disposal. Inasmuch as the federal regulations concerning characterization of wastes as F002, require chemical analysis to support, Wausau has concluded that the Region's disposal activities were unnecessary and gratuitous, not in furtherance of the Order or the ERAP and inconsistent with the NCP, and only necessitated, if at all, by the Region's unnecessary decontamination activities (including the use of solvents and diesel fuel customarily used in decontamination activities) referred to in the Agency's April 29, 1992 letter. USEPA has

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no information that these disposal or decontamination activities were necessary following the Wausau-financed cleanup activities; USEPA has no information that supports the Region's conclusions that the Region's disposal activities associated with the protective clothing and miscellaneous debris supports the Region's conclusion that Wausau did not complete the cleanup.

- o. Wausau requested information or reports that support or verify or which were considered or relied on by the Region in reaching the various conclusions found in the Region's various correspondence dated June 10, 1991, August 9, 1991 and April 29, 1992. No information was provided by the Agency or the Region concerning the allegations and conclusions contained in the Region's correspondence stated above. Wausau concludes that the allegations and conclusions contained in the Region's correspondence dated June 10, 1991, August 9, 1991 and April 29, 1992 are unsupported.
- 4. Wausau's requested information on the Protocols, Supporting Documents and Plans prepared by the USEPA or the contractors involved in the USEPA-initiated cleanup activities, specifically:
  - a. Information or reports concerning Site stabilization activities;
  - b. Field notes prepared by the TAT on OSC;
  - c. Photographic logs;
  - d. Photographs of the Site;
  - e. Field sampling plans;
  - f. Survey notes;
  - g. Field investigation reports;
  - h. Field notes documenting actual sampling methods and locations;
  - i. Reports of total petroleum hydrocarbon analysis, verified by narratives, the procedures, analytical methods, sampling plans and techniques, recovery and controls/ matrix spikes, POLs and MDLs for the methods,

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dilution factors, chain of custody forms and reports on the assessment of the validation of such data;

- j. Reports describing the vertical and lateral extent of contamination at the Site;
- k. Reports or other documents describing the design of the Fund-financed cleanup;
- l. Reports or other documents describing the decontamination protocols and implementation of the decontamination activities in the Fund-financed cleanup activities;
- m. Reports or other documents in the form of a final report summarizing the Fund-financed cleanup activities.

Outside of the ORC's file, which the Agency indicated was not considered or relied on by the Agency or the Region, Wausau did not receive any narrative report or reports concerning any of the activities described in this paragraph, or any subpart, that support or verify the Region's otherwise unsupported conclusion that USEPA-initiated cleanup activities were necessary, pursuant to the Order and ERAP, consistent with the NCP or the Region's conclusion that Wausau had not completed the Ordered activities.

- 5. Wausau requested information concerning the various administrative records concerning the CIW Site.

The Agency assured Wausau that no separate administrative record is kept (beyond the three identified). The Agency also indicated to Wausau that the Agency has considered and relied on only the documents contained in the AR, Petition in making its preliminary decision.

Also, the Region responded to Wausau's inquiries concerning the administrative record (see: Region's August 5, 1992 letter). The Region cited the NCP and OSWER Directive No. 9833.3A-1 as authority for what the Region considered in creating and maintaining the administrative records regarding this matter. Later the Region made a copy of OSWER Directive No. 9833.3A-1 available to Wausau for review and copying.

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## 6. Timing of Comments

Wausau then concluded its Requests for Information describing the lack of support or verification for the conclusions reached in the Region's April 29, 1992 letter, and seeking an extension of time to comment on the preliminary decision letter of June 2, 1992, until after Wausau had had sufficient time to review the requested information when received.

### Specific Request for Information From the Region

In addition, Wausau requested information specifically from the Region concerning the specific disposal activities cited in the Agency's April 29, 1992 correspondence (but not specifically referred to in the Agency's June 2, 1992 preliminary decision). Outside of the OSC's file which contained copies of the waste manifests generated by USEPA, Wausau received no narrative reports, sampling data or the like relating thereto.

In the June 25, 1992 Request for Information to the Region, Wausau also requested that the Region include the following items into the Administrative Record (AR, Petition) as they contain relevant information relating to the Petition for Reimbursement, and which had presumably been considered or relied on by the Region (or considered and rejected by the Region).

- a. The Emergency Response Action Plan, dated February, 1990, (ERAP) and forwarded to USEPA with correspondence dated February 22, 1990;
- b. The February 22, 1990 correspondence from Mr. Frederick S. Mueller to the Region;
- c. The Response Action Report, dated February, 1991, (RAR), and forwarded to USEPA with correspondence dated February 21, 1991;
- d. The Post Remedial Action Compliance Comments, dated July, 1991, (PRACC), and forwarded to USEPA with correspondence dated July 9, 1991;
- f. The July 9, 1991 correspondence from Mr. Frederick S. Mueller to the Region;

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- g. The Supplemental Post Remedial Action Compliance Comments, dated May 22, 1992, (SPRACC), and forwarded to USEPA with correspondence dated May 26, 1992;
- h. The May 26, 1992 correspondence from Mr. Frederick S. Mueller to the Region;
- i. The Affidavit of Howard Aidenbaum, dated December 19, 1989, and delivered to USEPA on December 21, 1989;
- j. The October 24, 1990 correspondence from Mr. Frederick S. Mueller to the Region;
- k. The correspondence dated on or about October 1, 1990 from Conestoga-Rovers & Associates to the Region;
- l. The October 22, 1990 correspondence from Mr. Brett L. Warning (ORC) Region to Conestoga-Rovers & Associates;
- m. The September 28, 1990 correspondence from Mr. Frederick S. Mueller to the Region;
- n. The September 21, 1990 correspondence from Mr. Frederick S. Mueller to the Region;
- o. The August 20, 1990 correspondence from Mr. Frederick S. Mueller to the Region;
- p. The February 1, 1991 correspondence from Conestoga-Rovers & Associates to Mr. Guria of the Region;
- q. The June 18, 1991 correspondence from Mr. Frederick S. Mueller to the Region;
- r. The June 20, 1991 correspondence from Mr. Frederick S. Mueller to the Region;
- s. The June 21, 1991 correspondence from Mr. Frederick S. Mueller to the Region;

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- t. The July 3, 1991 correspondence from Mr. Frederick S. Mueller to the Region;
- u. The June 18, 1991 correspondence from Mr. William J. Anaya to Mr. Fred Zimmerman of USEPA Headquarters in Washington, D.C.; and
- v. The June 25, 1991 correspondence from Mr. William J. Anaya to the Region;

The Region responded that Wausau's continued insistence, "for over two and one-half years, that virtually every document be included in the administrative record for the CIW Site is misplaced, as [Regional Counsel has] told representatives for Wausau in the past. Please consult Subpart I of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), found at 40 C.F.R. Part 300.800, and U.S. EPA's OSWER Directive No. 9833.3A-1... for guidance on the selection of documents for filing in a site administrative record."

Wausau concludes from the Region's preceding comment and Wausau's review of the NCP and the cited OSWER Directive that unless the specific document is in the administrative record for the specific "operable unit" the Region did not consider the document or information contained therein (nor consider it, and reject it) at all in making its decision, or the Region misunderstands the NCP and the Agency's Directive.

## **Agency's August 5, 1992 Letter**

In furtherance of providing full and complete comments to the Agency regarding the issues raised in the Agency's preliminary decision, Wausau respectfully comments on the responses of USEPA and the Agency's in their respective correspondence dated August 5, 1992.

The administrative record performs a variety of functions, but most notably two: (1) the record is designed to contain all of the documents that "form the basis" for the administrative action for judicial review of any issue concerning the adequacy of the administrative action. In certain instances, judicial review is limited to the administrative record; and (2) the administrative record acts as a vehicle for public participation in administrative actions. (OSWER Directive 9833.3A-1, pp. 1,2.)

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As stated in the Agency's August 5, 1992 letter, only the documents contained in the AR, Petition formed the basis of the Agency's preliminary decision of June 2, 1992. In other words, the administrative records prepared for the removal action (AR, Removal) and the response action (AR/RA) were not considered by the Agency in considering the limited issues raised in the preliminary decision and Wausau's Petition for Reimbursement. Also the documents and other correspondence from Wausau did not "form the basis" of the USEPA's action and were not considered or relied on by the Region or the Agency in making the preliminary decision unless they are found in the AR, Petition. Wausau understands that the Region has interpreted "forms the basis" of the Agency's decision to mean "supports" the Agency's decision. Wausau submits that this interpretation is wrong, and is contrary to the NCP and effectively denies Wausau its right to judicial review.

According to OSWER Directive No. 9833.5, (Guideline on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions", dated June 29, 1992) a petitioner seeking reimbursement from Superfund must show, among other things, that the threshold statutory requirements are met. According to the Agency, the issue here is whether Wausau "completed" the Ordered activities, and according to OSWER Directive 9833.5, "completion" is largely a function of the Region's analysis. Wausau submits that leaving the analysis of "completion" to the Region is constitutionally unsound, at least as it is now interpreted by USEPA.

According to Agency representatives and OSWER Directive 9833.5, the Agency, in initially reviewing a petition for reimbursement, "may first perform a summary review" of the matters as developed by the Region, without further investigation into the facts of the case (OSWER Directive 9833.5, pp. 5-10, at, 7). In other words, the Agency will (for reasons of convenience and conservation of resources) not independently investigate the facts at issue, but rely on the threshold facts as developed by the Region. If, after a summary review, the Region and the Petitioner disagree, the Petitioner may comment on the Agency's summary recapitulation of the Region's analysis, and the burden of proof for all factual matters, including the "threshold statutory requirements", the matters relating to liability, and the issues relating to arbitrary and capricious behavior, falls upon the Petitioner, in this case, Wausau.

At the same time, the Region must keep mindful of the dual purposes of an administrative record. The record forms the basis for the administrative action and judicial review, and allows for public participation in the Agency action. (OSWER

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Directive 9833.3A-1; NCP § 300.800.) In the preliminary review of the Region's analysis of a petition for reimbursement, the Agency's administrative record is summarily prepared by the Region, and the record reflects only documents and reports prepared by the Region that generally "support" the Region's conclusions. According to the Region's August 5, 1992 letter, the administrative record is significantly limited, and does not contain "virtually every document generated in this matter".

In this matter, the entire administrative record for the Agency's actions relating to the preliminary decision was hand-picked by the Region. The current administrative record contains only documents and reports, the Region's characterization of phone conversations and other evidence that "support" the Region's conclusions that Wausau did not complete the required actions. Absolutely no care was given to documents that support Wausau's positions, and which were, or may have been considered and rejected by the Region.

The NCP states, however, that the administrative record should contain all of the documents that "form the basis" of the administrative action (40 CFR Part 300.800 et seq.) (emphasis added). The Region's interpretation that "forms the basis" is synonymous with "supports the Agency's decision" ignores the primary purposes of an administrative record: (1) to develop a record for judicial review; and (2) to encourage public participation in the Agency's action. (See OSWER Directive 9833.3A-1 at pp. 1-2, and Preamble Subpart I, 1.1.1, "Administrative Record for Selection of Response Action" attached to OSWER Directive 9833.3A-1.)

Wausau's request "for over two and one-half years, that virtually every document generated in this matter be filed in the administrative record for the CIW Site" is not misplaced. Wausau's interpretation that the administrative record should/must contain all relevant documents, data, comments and the like, whether or not they support the Agency's action, also finds support in OSWER Directive 9833.3A-1:

"The administrative record is the body of documents that 'forms the basis' for the selection of a particular response at a site. This does not mean that documents which only support a response action are placed in the administrative record. Documents which are included are relevant documents that were relied upon in selecting the response action, as well as relevant documents that were considered but ultimately rejected (e.g., documents 'considered or relied on'). (emphasis added)



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[OSWER Directive 9833.3A-1] uses the phrase 'considered or relied on' in discussing which documents should be included in the administrative record to indicate that it is EPA's general policy to be inclusive for placing documents in the administrative record, (emphasis added). However, this term does not (emphasis in the original) mean that drafts or internal documents are normally included in the administrative record.... Thus, the record will include final documents generated by the lead and support agency, as well as technical and site-specific information. (emphasis added) Information or comments submitted by the public or potentially responsible parties (PRPs) during a public comment period (even if the lead agency does not agree with the information or comments) are also included in the administrative record [emphasis added]. (See OSWER Directive 9833.3A-1 at p. 2.)

A public comment period, in general, is associated with every agency decision. (See: OSWER Directive 9833.3A-1.) In this case, a separate administrative record was created relating to the Agency's decisions concerning the Petition for Reimbursement (see AR, Petition). The first Agency "decision" event came when the USEPA denied Wausau's Petition for Reimbursement contained in USEPA's June 10, 1991 letter (copy attached; marked Exhibit N). The Agency again preliminarily denied Wausau's Petition for Reimbursement on June 2, 1992, and requested these comments relating thereto. Now is a proper time to include those various items in the administrative record (as described in the June 25, 1992 letter to the Region), despite the Region's protest. Furthermore, the documents, reports, technical data, etc. sought in requests for information of June 25 and June 18 should have been included in the Agency's administrative record, even though the Region and/or the Agency disagrees with the conclusions stated therein. Wausau's repeated requests that various documents be included in the administrative record is consistent with the NCP and the OSWER Directive whether or not they "support" the Region's conclusion(s). (The Agency Directive recognizes a petitioner's need for information at this critical time so long as it relates to the administrative action involved. Indeed, the Agency Directive encourages the "Regions to make every effort to release relevant investigatory records" to petitioners seeking reimbursement (see OSWER Directive 9833.5, at p. 10 et seq.)

Again, the purpose of the administrative record is not simply to "support" USEPA's position, but to encourage public participation and to provide an adequate record for judicial review. As stated in OSWER Directive 9833.3A-1:

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"Section 113(j) of CERCLA provides that judicial review of any issues concerning the adequacy of any response action shall be limited to the administrative record.

Judicial review based upon an administrative record provides numerous benefits. Under Section 113(j) of CERCLA and general principles of administrative law, when the trial court reviews the response action selected, the court is limited to reviewing the documents in the administrative record."

To be sure, then, the administrative record is not simply designed to only "support" USEPA's position, but to provide a publicly reviewable and judicially reviewable basis for the Agency's actions as well as support for, all of the parties associated with an administrative action. It is not unreasonable to ask that documents considered and relied on as well as documents considered and rejected by the administrative agency be included in the public record. If USEPA considers and rejects a position, the propriety of that action is reviewable, under the facts and circumstances of the case, as are the rejected facts. If the party whose decision is subject to review is allowed to pick and choose the evidence that will be reviewed, their judgment is suspect and a de novo review of the record is a sham.

"The effort to establish adequate administrative records encompass a vast array of people including: Administrative Record Coordinators (OSCs), enforcement staff, recoveries management staff, Regional Counsel staff, Community Relations Coordinators (CRCs), other federal agencies, States, CERCLA contractors, and the public. (emphasis added). (The 'public' includes potentially responsible parties (PRPs))." (emphasis added) (OSWER Directive 9833.3A-1, at pp. 2-3.)"

As the courts and Congress have recognized, the interests of the environment, while great and generally good public policy, cannot be paramount to constitutional protections of parties involved in the process. In situations such as this, where judicial review is severely restricted, and further, as here, where the Agency action is reviewed within the Agency, without recourse to an administrative law judge or an administrative hearing, the development of the administrative record is critical. Ignoring the PRP's arguments, or selecting only those documents that support the Agency's interpretations or actions, is dangerous and may violate the constitutional protections provided by Congress in the Superfund Amendments and Reauthorization Act, 1986 (SARA) - namely the constitutional protection provided by the CERCLA Section 106(b)(2) reimbursement provisions.

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Furthermore, nothing here should be construed to imply that Wausau concurs that the evidence currently found in the administrative record is proper, or that it properly supports the administrative action taken in the preliminary decision. Wausau submits, rather, that every document in the AR, Petition is conclusionary and completely unsupported by any credible evidence, witnesses, or scientific data.

At pages 22 through 42, of OSWER Directive 9833.34-1, the Agency identifies a typical "Contents of the Administrative Record". Certainly documents that support an agency's decisions are proper, albeit necessary, lest USEPA be judged arbitrary or capricious in its actions. However, systematically excluding documents that are contrary to its actions provides a party with an opportunity to go outside of the administrative record.

At a bare minimum, the administrative record should include the following items relating to the Region's activities following Wausau's completed actions at the Site:

- a. the Work Plan used by the Region's contractor;
- b. the Sampling and Analysis Plan (SAP), with the quality assurance project plan (QAPP) and a field sampling plan;
- c. "verified" sampling data which were "considered or relied on" (i.e., considered and relied on, and considered and rejected) by the Agency in determining non-completion/non-compliance. (Note: 40 CFR § 300.805(a)(1) indicates that "verified sampling data" are data that have undergone the quality assurance and quality control process. "Invalidated sampling data" is data that has been incorrectly gathered or analyzed and will not be part of the record file. "Unvalidated sampling data" are data which have not yet undergone the quality assurance and quality control process. Because [unverified data is] superseded by verified data, the unvalidated data are not generally part of the record files.... Unvalidated sampling data which are relied on in selecting a response action should be included in the record file.) (emphasis added)
- d. chain of custody forms;
- e. inspection reports;
- f. data summary sheets;

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- g. technical studies and reports;
- h. data, comments, reports submitted by PRPs or other interested persons;
- i. USEPA policy and guidance documents;
- j. public participation documents
- k. public/PRP comments;
- l. responses to comments;
- m. orders/decrees;
- n. Affidavits containing relevant factual information not contained elsewhere in the file;
- o. USEPA decision documents.

These documents comprise a record file that is consistent with the NCP, whether or not the documents support the Agency's activities. (See: OSWER Directive 9833.3A-1, pp. 23-29.)

Wausau's various requests, and most notably the June 18, 1992 and the June 25, 1992 Requests for Information were necessary because the Administrative Records have been inadequate. With regard to the AR, Petition, the record is inadequate and not only does not support the preliminary decision, but fails to allow Wausau either the opportunity to adequately respond to the conclusion or to supplement the record appropriately. Regrettably, this is not an isolated frustration for Wausau. For "two and one-half years" Wausau has asked for a complete administrative record, and the Agency has rejected Wausau's requests and continued to exclude relevant, proper documents and requests, and not place other items in the record that the Agency has considered and rejected in taking administrative action.

As the administrative record stands now, the Region states that the Region performed various activities that were made necessary because Wausau allegedly failed to complete the Ordered activities. Yet, the AR, Petition does not contain one piece of "verified" or "unverified" data, not one single report, study, summary, field

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note or plan in support thereof. The administrative record is also devoid of documents or arguments prepared by or on behalf of Wausau's position.

To the extent that the AR, Petition has few documents supporting Wausau's position regarding completion is not for want of trying on Wausau's part. The most egregious, systematic failure to include proper, probative and directly relevant evidence relating to the Agency's review of Wausau's activities in completing the cleanup activities, was the Region's exclusion of the Response Action Report (RAR). The RAR is Wausau's final report and summary of Wausau's activities at the CIW Site. It contains a complete analysis of the Order, the ERAP, and describes, in detail, Wausau's activities at the Site. The RAR contains verified sampling and analytical data concerning environmental conditions at the Site. It contains a paragraph-by-paragraph analysis of the Order and the ERAP. The RAR contains a SAP, a QAPP, chain of custody forms, inspection reports, field notes, data summary sheets, technical supporting documents, weekly progress reports, correspondence, and even USEPA supportive documents, considered and resolved by Wausau - with a complete description thereof. After reviewing the Order and the ERAP and analyzing the cleanup activities, analysis and reports, the RAR concludes: (1) Wausau completed the ordered cleanup activities; and (2) complied with the Order as amended by the ERAP. The RAR is in stark contrast to the administrative record prepared by the Region where the Agency's preliminary decision was formed. The RAR should be included in the Agency's administrative record involving the preliminary decision, whether or not it "supports" the Region's conclusions.

The absence of the final report (i.e., RAR) from the administrative record was noted by the Agency in the preliminary decision, and cited as specific evidence of non-completion/non-compliance on behalf of Wausau.

"In addition, many orders require that a respondent issue a final report to the appropriate Region for approval when the required action is complete. In this instance, Wausau did not complete the removal action required by the Order." (preliminary decision of June 2, 1992).

It is difficult to explain how Wausau could be criticized for the Region's failure to include the RAR, unless the Region was acting arbitrarily and capriciously. Perhaps the same analysis is available to explain the Region's failure to include the Affidavit of Howard Aidenbaum, tendered to the Region during the USEPA-solicited comment period following the issuance of the Unilateral Administrative CERCLA Section 106 Order in December 1989, and at several other times since. (See

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correspondence from Wausau to the Region dated January 20, 1990, copy attached; marked Exhibit "O").

Because Mr. Aidenbaum's affidavit, relates to Wausau's alleged liability, and does not "form the basis" (i.e., "support") the Region's determination finding Wausau liable, the Region excluded the affidavit. (A copy of Mr. Aidenbaum's Affidavit is attached; marked Exhibit "P".)

If the Region indicates that the RAR and/or Mr. Aidenbaum's affidavit were not "considered", even though each contained relevant and proper information, then the Region further acted arbitrarily and capriciously in systematically excluding relevant documents in support of Wausau's position. Furthermore, if the Region suggests that Mr. Aidenbaum's affidavit was excluded because "[i]nformation regarding PRP liability is generally not included.... except to the extent that such information is considered or relied on in selecting the response action" (OSWER Directive 9833.3A-1 at p. 33), the Region did include the affidavits of Mr. Van Hook and Mr. Sciafini presumably for those reasons, only Mr. Aidenbaum's affidavit does not "support" the Region's determination of liability. To chose to exclude Mr. Aidenbaum's affidavit, and not the others, is inconsistent with this position.

Despite repeated requests to supplement the administrative record for information, the Region has not produced one scintilla of evidence, even in the form of unverified data, that supports its unverified conclusions in the Agency's April 29, 1992 letter which "formed the basis" of the Agency's preliminary decision of June 2, 1992. If the Agency recognizes the RAR, the Region's conclusions are completely unsupported in comparison. If the Region discovers, upon further review, that supporting evidence does exist, and attempts to submit it to the Agency after withholding it from the public and Wausau, the Agency should deny the Region's request and find further arbitrary and capricious behavior.

The Agency should take care to require that the parties are satisfied that the administrative record is complete, so as to preserve the integrity of the system. Without it, another summary examination, parroting the unsubstantiated claims of the Region, is a sham.

It is regrettable that Wausau has been required to spend as much time and effort making an administrative record for review. The process should not require so much effort and so much time simply to seek what is constitutionally required in non-ALJ adjudicatory proceedings with delayed and possibly limited judicial review.

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That the Region has failed to properly augment and substantiate the administrative record is arbitrary and capricious behavior.

Finally, inasmuch as the Agency suggests that the "Joint Motion to Stay Proceedings" in Employers Insurance of Wausau, a Mutual Company v. George Bush, et al., No. 91C4254, pending in the United States District Court, in the N.D. of Illinois, affects this administrative proceeding, Wausau notes that the Motion to Stay related only to discovery in that specific District Court action (not this or any other administrative proceeding).

As stated in Wausau's Comments to the Preliminary Decision dated September 14, 1992, Wausau considers the current administrative record (as described above), and the Region's incomplete, random, unindexed, unsupported and unverified file, as insufficient evidence upon which to properly comment on the preliminary decision. In addition, please include this letter and attachments in the Administrative Record concerning Wausau's Petition for Reimbursement.

Respectfully submitted,

Employers Insurance of Wausau

By

  
Johnson & Bell Ltd. Its Attorneys